

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK**

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**CHRISTOPHER R. CATALANO,**

**Plaintiff,**

**v.**

**04-CV-0452A(Sr)**

**STATE FARM INSURANCE  
CASUALTY COMPANY,**

**Defendant.**

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**REPORT, RECOMMENDATION AND ORDER**

This case was referred to the undersigned by the Hon. Richard J. Arcara, pursuant to 28 U.S.C. § 636(b)(1), for all pretrial matters and to hear and report upon dispositive motions. Dkt. #3.

Currently before the Court is defendant's motion for summary judgment dismissing the complaint (Dkt. #8), and plaintiff's motion for summary judgment on the issue of liability. Dkt. #11. For the following reasons, it is recommended that defendant's motion be granted and plaintiff's motion be denied.

**BACKGROUND**

Plaintiff is the owner of a single family home located in the Town of Angola, New York. Dkt. #11-3, ¶ 1. The residence was insured pursuant to a standard homeowner's policy issued by State Farm Insurance Company ("State Farm"), on April 20, 2002. Dkt. #8, ¶ 3; Dkt. #11-3, ¶ 2. The policy provides insurance coverage for the following:

**COVERAGE A - DWELLING**

We insure for accidental direct physical loss to the property described in Coverage A, except as provided in **SECTION I – LOSSES NOT INSURED.**

Dkt. #9-6, p.11. Section I – Losses Not Insured, provides as follows:

1. We do not insure for any loss to the property described in Coverage A which consists of, or is directly and immediately caused by, one or more of the perils listed in items a. through n. below, regardless of whether the loss occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:

\* \* \*

- f. continuous or repeated seepage or leakage of water or steam from a:

\* \* \*

- (3) plumbing system, including from within or around any shower stall, shower bath, tub installation, or other plumbing fixture, including their walls, ceilings or floors;

which occurs over a period of time. . . .

\* \* \*

- i. mold, fungus or wet or dry rot;

\* \* \*

2. We do not insure for any loss which would not have occurred in the absence of one or more of the following excluded events. . . .

- d. **Neglect**, meaning neglect of the **insured** to use all reasonable means to save and preserve property at and after the time of a loss, or when the property is endangered.

\* \* \*

3. We do not insure under any coverage for any loss consisting of one or more of the items below. . . .

\* \* \*

- b. defect, weakness, inadequacy, fault or unsoundness in:
  - (2) design, specifications, workmanship, construction, grading, compaction;
  - (3) materials used in construction or repair; or
  - (4) maintenance;

\* \* \*

Dkt. #9-6, pp.13-15. The policy also provides:

**COVERAGE C – LOSS OF USE**

1. **Additional Living Expense.** When a Loss Insured causes the **residence premises** to become uninhabitable, we will cover the necessary increase in cost you incur to maintain your standard of living for up to 24 months. . . .

Dkt. #9-6, p.7.

On May 8, 2002, plaintiff vacated his residence due to extensive mold contamination. Dkt. #11-3, ¶ 11. On May 9, 2002, while the policy was in full force and effect, plaintiff notified State Farm of a claim caused by “toxic and hazardous molds and bacteria.” Dkt. # 8, ¶¶ 4-5 & Dkt. #11-3, ¶ 5. By letter dated May 14, 2002, State Farm advised plaintiff that it was questionable, *inter alia*, whether “[t]his loss falls under the coverages of the policy” and whether “[t]his loss consists wholly or partially of mold.” Dkt. #8-3, p.6. State Farm reserved its right to deny liability pending investigation of

the claim and notified plaintiff that:

In the absence of notice to the INSURER to the contrary, the INSURED agrees that no action taken in cooperating with the INSURER's investigation will estop the INSURER from exercising any rights or defenses granted by the policy under which the claim is made.

Dkt. #8-3, pp.6-7.

State Farm retained Environmental Laboratory Services ("ELS"), to test the residence. Dkt. #8, ¶ 7. ELS opined that

the mold condition in the structure is due to long term moisture problems rather than a catastrophic plumbing failure. The physical appearance of wood structures and the growth pattern of the mold demonstrate this. It is not possible to determine when the mold growth started. Evidence of wood decay is slight giving the impression that the condition does not span a long time period.

Dkt. #8-3, pp.9-10.

Plaintiff retained a mold inspector, Craig Libglid, to inspect the premises. Dkt. #11-3, ¶ 9. In a report dated June 26, 2002, Mr. Libglid reported the following observations:

- 1) There is evidence of moisture problems in the bathroom area due to poor ventilation, and what appears to be a leak between the tub surround area where it meets the tub behind the wall.
- 2) There is visible mold in the crawl space in [sic] under the dwelling due to poor ventilation.
- 3) There is visible mold in the crawl space in the attic area.
- 4) The grading . . . around the structure needs to be regraded.

- 5) There is evidence of a moisture problem where the siding meets the deck inside the bedroom wall.

Dkt. #8-3, p.23.

State Farm retained Building Science Investigations, Inc. ("BSI"), to further investigate the mold contamination at the premises. Dkt. #8, ¶ 11. In a report dated March 30, 2003, BSI concluded that:

The sources of moisture that prompted the growth of organisms in the crawlspace is a combination of moisture migration through the concrete block foundation, moisture migration through the soil floor, moisture migration at the sill plate, historical plumbing leaks and a seasonally high relative humidity level from standing water. The degree of water damage, moisture content readings, pattern of water staining, pattern of microbial growth . . . and the types of organisms observed on the building materials are consistent with long-standing moisture migration in the crawlspace.

The building science audit of the attic illustrated mold growth over the majority of the sheathing . . . with the exception of a replaced section of plywood sheathing. The sources of moisture that promoted the growth of organisms are a combination of historical roof leaks (suggested by the repaired section of roof) and a high relative humidity level due to a lack of ventilation. The degree of water damage, the uniform areas of microbial growth, the types of organisms observed on the sheathing, the plugged vents and the oxidation of the nail points are indicative of a long-standing ventilation problem.

In both cases, the sources of moisture that contributed to the growth of organisms in the residence occurred over a relatively long period of time. It also appears that the owner was aware of these conditions based on the repairs to the residence. In the crawlspace, the owner had repaired plumbing lines, replaced the furnace, made modifications to the dryer exhaust and removed the open celled white foam sheathing from the bottom of the joists. In the attic, a layer of fiberglass batt insulation was added to the floor, damaged sheathing was replaced and polystyrene baffles were placed

in the attic (but not installed). The owner had knowledge of these conditions and discussed the repairs openly during the investigation.

Dkt. #8-3, p.41.

By letter dated April 25, 2003, State Farm disclaimed coverage for the damages claimed by plaintiff on the ground that:

There is no coverage for mold damage to your dwelling because the damages were not caused by accidental direct physical loss. In addition, damage caused by mold is specifically excluded by your policy. There are also several other policy exclusions that apply . . .

Dkt. #11-6, p.1. State Farm also disclaimed coverage for additional living expenses incurred by plaintiff "because a Loss Insured did not cause the damages to your dwelling and personal property." Dkt. #11-6, p.3.

## **DISCUSSION AND ANALYSIS**

### **Summary Judgment**

\_\_\_\_\_ Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). "In reaching this determination, the court must assess whether there are any material factual issues to be tried while resolving ambiguities and drawing reasonable inferences against the moving party, and must give extra latitude to a pro se plaintiff." *Thomas v. Irvin*, 981 F. Supp. 794, 799 (W.D.N.Y. 1997) (internal citations omitted).

A fact is "material" only if it has some effect on the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); see *Catanzaro v. Weiden*, 140 F.3d 91, 93 (2d Cir. 1998). A dispute regarding a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248; see *Bryant v. Maffucci*, 923 F.2d 979 (2d Cir.), *cert. denied*, 502 U.S. 849 (1991).

Once the moving party has met its burden of "demonstrating the absence of a genuine issue of material fact, the nonmoving party must come forward with enough evidence to support a jury verdict in its favor, and the motion will not be defeated merely upon a 'metaphysical doubt' concerning the facts, or on the basis of conjecture or surmise." *Bryant*, 923 F.2d at 982. A party seeking to defeat a motion for summary judgment

must do more than make broad factual allegations and invoke the appropriate statute. The [party] must also show, by affidavits or as otherwise provided in Rule 56 of the Federal Rules of Civil Procedure, that there are specific factual issues that can only be resolved at trial.

*Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir. 1995).

### **Coverage for the Loss**

State Farm argues that the insurance policy does not cover loss caused by a failure to adequately maintain the premises to address long-standing moisture problems. Dkt. #8-2, p.4.

“It is well established under New York law that a policyholder bears the burden of showing that the insurance contract covers the loss.” *Morgan Stanley Group, Inc. v. New England Ins. Co.*, 225 F.3d 270, 276 (2d Cir. 2000); see *Consolidated Edison of N. Y., Inc. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 218 (2002) (“Generally, it is for the insured to establish coverage and for the insurer to prove that an exclusion in the policy applies to defeat coverage.”). In other words, “[a]n insured seeking to recover for a loss under an insurance policy has the burden of proving that . . . the loss was a covered event within the terms of the policy.” *Topor v. Erie Ins. Co.*, 28 A.D.3d 1199 (4<sup>th</sup> Dep’t 2006).

In the instant case, the policy provides insurance coverage “for accidental direct physical loss” to plaintiff’s residence. Dkt. #9-6, p.11. To fall within this definition, the insured must demonstrate that the loss was fortuitous, or beyond its control. See *Consolidated Edison*, 98 N.Y.2d at 220 (“Insurance policies generally require ‘fortuity’ and thus implicitly exclude coverage for intended or expected harms”), *citing* New York Insurance Law § 1101(a)(1) (defining insurance contract as any agreement whereby one party, the insurer, is obligated to confer benefit of pecuniary value upon another party, the insured, depending upon the happening of a fortuitous event). “Thus, the requirement of a fortuitous loss is a necessary element of insurance policies based on either an ‘accident’ or ‘occurrence.’” *Id.* “New York courts have construed the term ‘fortuitous event’ to mean an event ‘happening by chance or accident.’” *40 Gardenville v. Travelers Prop. Cas. of America*, 387 F. Supp.2d 205, 211 (W.D.N.Y. 2005).

The evidence before the Court is uncontroverted that the mold contamination was not caused by a fortuitous event, but was the result of “long term moisture problems;” “long-standing moisture migration;” and a “long-standing ventilation



problem” caused by inadequate maintenance. Dkt. #8-3, pp. 9-10 & Dkt. #8, p.41. Accordingly, the loss does not fall within the policy’s coverage “for accidental direct physical loss.” Dkt. #9-6, p.11. See *Siegel v. Chubb Corp.*, 33 A.D.3d 565 (1<sup>st</sup> Dep’t 2006) (granting summary judgment to insurer where there was “no evidence that the mold was caused by any leak, which plaintiffs argue would be a covered occurrence.”); *Hritz v. Saco*, 18 A.D.3d 377, 379 (1<sup>st</sup> Dep’t 2005) (granting summary judgment to insurer since the claim was “outside the policy coverage” where there was no “showing that the loss was fortuitous”).

Plaintiff argues that the mold exclusion contained in the policy was not approved by the New York State Department of Insurance and is, therefore, unenforceable. Dkt. #11-4, p.1. In support of this argument, plaintiff cites materials from the Office of General Counsel representing the position of the State of New York Insurance Department regarding mold exclusions and the transcript of testimony by Gregory V. Serio, Superintendent of the New York State Insurance Department before the Joint Senate Committees on Health and Environmental Conservation Regarding the Issue of Toxic Mold. Dkt. #11-4, p.2. While these documents indicate that the Superintendent has not approved any limitations or exclusions for mold-related coverage, they also state that:

Coverage for property damage resulting from mold is generally excluded under property insurance coverage unless it is a consequence of a covered loss, such as a burst water pipe, or wind-driven rain. Only where there is a causal link between the mold and the covered peril would a policy provide coverage.

Dkt. #11-12, p.1; see Dkt. #11-13, p.3. In his testimony before the Senate Committees, the Superintendent further explained that

Coverage for property damage done by mold is generally excluded under a property policy unless it is a consequence of a covered loss such as a burst water pipe or wind-driven rain. For example, the 1991 Insurance Services Office, Inc. (ISO) homeowners policy excludes coverage where mold occurs naturally due to moisture and relative humidity. ISO is a rate service organization that generally serves as the property and casualty industry standard for policy terminology and practices. Mold damage typically is not covered under the [property] policy because it is viewed as a home maintenance problem as opposed to a peril of a fortuitous nature. Only when there is some causal link between the mold and the covered peril would the policy provide coverage.

Dkt. #11-13, p.3. Thus, these documents demonstrate a distinction between the existence of coverage for mold damage caused by maintenance problems and the exclusion of coverage for mold damage resulting from an otherwise covered loss, *to wit*, a burst water pipe or wind-driven rain.

Plaintiff also argues that State Farm's delay in denying plaintiff's claim was unreasonable and void pursuant to New York Insurance Law § 3420(d). Dkt. #11-4, p.3. As a result, plaintiff argues that State Farm has waived any right it may have had to deny coverage. Dkt. #11-4, p.3. As an initial matter, the Court notes that Insurance Law § 3420(d) applies only to claims for "death or bodily injury." See *Worcester Ins. Co. v. Bettenhauser*, 95 N.Y.2d 185, 188 (2000). Moreover,

Disclaimer pursuant to section 3420(d) is unnecessary when a claim falls outside the scope of the policy's coverage portion. Under those circumstances, the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed.

*Id.* In any event, State Farm's letter of May 14, 2002, issued within a week of plaintiff's

notice of claim, expressly reserved its right to deny coverage pending investigation of plaintiff's claim. Dkt. #8-3, pp.6-7.

### **CONCLUSION**

Based on the foregoing, it is **RECOMMENDED** that defendant's motion for summary judgment dismissing the complaint (Dkt. #8), be **GRANTED** and that plaintiff's motion for summary judgment on the issue of liability (Dkt. #11), be **DENIED**.

Accordingly, pursuant to 28 U.S.C. § 636(b)(1), it is hereby

ORDERED, that this Report, Recommendation and Order be filed with the Clerk of the Court.

ANY OBJECTIONS to this Report, Recommendation and Order must be filed with the Clerk of this Court within ten (10) days after receipt of a copy of this Report, Recommendation and Order in accordance with the above statute, Fed.R.Civ.P. 72(b) and Local Rule 72.3(a)(3).

The district judge will ordinarily refuse to consider *de novo* arguments, case law and/or evidentiary material which could have been, but was not presented to the magistrate judge in the first instance. See, e.g., *Patterson-Leitch Co. v. Massachusetts Mun. Wholesale Electric Co.*, 840 F.2d 985 (1st Cir. 1988).

Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Court's Order. *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed.2d 435 (1985); *Wesolek v. Canadair Ltd.*, 838 F.2d 55 (2d Cir. 1988).

The parties are reminded that, pursuant to Rule 72.3(a)(3) of the Local Rules for the Western District of New York, "written objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority." Failure to comply with the provisions of Rule 72.3(a)(3), or with the similar provisions of Rule 72.3(a)(2) (concerning objections to a Magistrate Judge's Report, Recommendation and Order), may result in the District Judge's refusal to consider the objection.

The Clerk is hereby directed to send a copy of this Order and a copy of the Report and Recommendation to counsel for the parties.

**SO ORDERED.**

DATED: Buffalo, New York  
January 8, 2007

S/ H. Kenneth Schroeder, Jr.  
**H. KENNETH SCHROEDER, JR.**  
**United States Magistrate Judge**